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1.4 **Citations Discussed.** WAC 251-01-165; WAC 251-04-040; RCW 41.06.040; RCW 41.06.010; RCW 41.06.070; WAC 251-01-370; WAC 251-01-170; RCW 28B.10.528; 28B.50.140(14) and (20); and WAC 251-06-050(1).

II. PROCEDURAL HISTORY AND BACKGROUND

2.1 On August 16, 2001, Appellant Paula Ochoa filed a rule violation appeal alleging that Respondent violated RCW 41.06.070(2) and WAC 251-04-040(11) in regard to the exemption of eight positions she believed should have been classified.

2.2 On September 23, 2002, Respondent filed a Motion to Dismiss. Respondent moved for dismissal on seven of the nine exempt positions alleging that the appeals were not timely filed. Respondent moved for dismissal on the remaining two exempt positions alleging that the uncontroverted facts showed that the positions were properly exempt.

2.3 On November 21, 2002, the Board granted summary judgment dismissing claims regarding seven of the positions because they were untimely filed. The Board also ordered that the remaining issue to be decided by the Board is whether the Family Literacy Specialist position and the WABERS Analyst position meet the criteria for classifications exempted under RCW 41.06.070(2)(b).

2.4 At the commencement of the hearing on December 12, 2002, counsel for WPEA moved to amend the appeal to add WPEA as a named party. The WPEA argued that as the exclusive bargaining representative for classified employees at the Columbia Basin College (College or CBC), it has an interest in the outcome of Ochoa v. CBC, RULE-01-0019. Respondent objected to the motion, arguing that the WPEA, at the time the appeal was filed, could have added itself as a party to the appeal. The Board took the motion under advisement and now denies WPEA's request.

1 This appeal was filed on behalf of the Appellant by the WPEA. Therefore, the WPEA had an
2 opportunity to name itself as an Appellant.

3
4 2.5 At the end of the hearing, the Board requested that the parties submit post-hearing briefs
5 concerning the CBC Board of Trustees' power to delegate authority to the President of the College
6 to exempt positions from civil service.

7 **III. FINDINGS OF FACT**

8 3.1 Noel Commeree, Instructional Dean for the Skills Enhancement Division, is responsible for
9 the Basic Skills Program at the College. Mr. Commeree has oversight of the College's Basic Skills
10 Programs, including English as a Second Language, Adult Basic Education, Corrections Education,
11 and Developmental Education.

12
13 3.2 In the summer of 2001, Mr. Commeree was seeking to create two positions that would be
14 exempt from civil service. At the time, the procedure at the College for requesting creation of a
15 new position required the official requesting the position to work with the human resource
16 department to create a position description. The official was responsible for completing a CBC
17 Personnel Request form and routing it, along with the position description, to the Vice President
18 and the Human Resource Manager for review and approval. The form is ultimately submitted to the
19 College President for the final review and approval.

20
21 3.3 WAC 251-01-165 defines an exempt position as:

22 A position properly designated as exempt from the application of these rules as
23 provided in WAC 251-04-040. (Also see separate definitions of "administrative
24 assistant exemption," "executive head exemption," "research exemption,"
25 "counseling exemption," "extension and/or continuing education exemption,"
26 "graphic arts or publication exemption," and "principal assistant exemption.")

1 3.4 WAC 251-04-040 specified the positions that were exempted from coverage of Title 251
2 WAC. The rule was repealed September 1, 2002 but it contained the same language found in RCW
3 41.06.070. The rule stated, in relevant part:

4 The following classifications, positions, and employees of higher education
5 institutions/related boards are hereby exempted from coverage of this chapter.

6

7 (11) The governing board of each institution/related board may also exempt from
8 this chapter, subject to the employee's right of appeal to the personnel appeals board,
9 classifications involving research activities, counseling of students, extension or
10 continuing education activities, graphic arts or publications activities requiring
11 prescribed academic preparation or special training, as determined by the
12 Washington personnel resources board: Provided, That no nonacademic employee
13 engaged in office, clerical, maintenance, or food and trades services may be
14 exempted by the Washington personnel resources board under this provision.

15 3.5 RCW 41.06.010 states, in relevant portion, that “all appointments and promotions to
16 positions and retention therein, in the state service, shall be made on the basis of policies herein
17 after specified.” The provisions of RCW 41.06.040(2) applies to “Each agency, each employee and
18 position therein, not expressly excluded or exempted” under the provisions of RCW 41.06.070.

19 3.6 RCW 41.06.070(2)(b) grants the governing board of a higher educational institution the
20 power to exempt certain job specifications from coverage of Chapter 41.06. Positions the
21 governing board may exempt from coverage include “classifications involving research activities ...
22 [and] extension or continuing educations activities ... PROVIDED, That no nonacademic employee
23 engaged in office, clerical ... may be exempted by the board under this provision”

Exemptions of Washington Adult Basic Education Reporting System (WABERS) Position

3.7 WABERS is a program designed to facilitate data collection and reporting of student enrollments in Adult Education Programs that helps support the progress of students and their success in the workplace and other educational areas. The Washington State Board for Community and Technical Colleges developed the WABERS program and provides the WABERS software program to qualified educational providers.

3.8 The WABERS program at the College employed a classified employee who performed data entry. Mr. Commerre, however, needed an employee that could produce reports from that data. Mr. Commeree consulted with Human Resources Manager, Ruben Lemos to discuss the work responsibilities of the position. Mr. Commeree subsequently took steps to request creation of an exempt position titled WABERS Analyst. Mr. Commeree completed a Personnel Request form and attached a list of the position's major duties and responsibilities, which included:

- Compiling and analyzing numerical and narrative data from identified sources
- Compiling information using various computer programs
- Providing information/reports to appropriate college entities as well as community and state organizations
- Analyzing data to support assessment of student progress in education and workplace
- Developing a variety of reporting formats
- Reviewing reports and numerical data for clarity, accuracy, and completeness
- Advising and informing staff regarding data updates
- Working closely with Learning Center and ESL Coordinators
- Availability to attend local and state training

3.9 Mr. Commeree submitted the Personnel Request form for the WABERS Analyst position to Donna Campbell, Vice President for Instruction, for review. Ms. Campbell reviewed the Personnel Request for the WABERS Analyst position and signed the request on August 1, 2001. Mr. Lemos signed the form on August 3, 2001.

1
2 3.10 Lee Thornton, President of the College, also authorized the request to create the exempt
3 WABERS Analyst position.

4 3.11 The College exempted the WABERS position under the research exemption rule. WAC
5 251-01-370 defines the research exemption and states:
6

7 Individuals in research-exempt positions spend the majority of their time in one or
8 more of the following activities: Identification and definition of research problems,
9 design of approaches or hypotheses and methodology to be used, design of specific
10 phases of research projects, analysis of results, development of conclusion and
11 hypothesis, presentation of research results in publishable form.

12 3.12 The WABERS Analyst position was filled on September 1, 2001. Mr. Commerre indicated
13 the most critical duty of the position was to conduct data queries that he could use to analyze data
14 such as student attendance. During the time the position was filled, the incumbent completed one
15 data query. The position is not currently filled.

16 **Exemption of the Family Literacy Program Specialist Position**

17 3.13 The Family Literacy Program provides literacy, parenting and job training to individuals in
18 need. At the time, the program consisted of a director and two teaching faculty members, who were
19 responsible for providing the training. Mr. Commeree and the program manager were responsible
20 for designing the curriculum.

21 3.14 Mr. Commeree felt there was a need to hire an individual to assist the manager for Family
22 Literacy. Mr. Commeree was specifically looking to create a position that was “second in
23 command” and who would be responsible for answering questions and making decisions when the
24 program manager was unavailable. Mr. Commeree again consulted with Mr. Lemos and completed
25 a second Personnel Request form asking for an exempt position titled Family Literacy Program
26

1 Specialist. Mr. Commeree attached the following description to the Personnel Request form
2 outlining the job's responsibilities:

- 3
- 4 • Assist with the overall coordination and integration of the Federal Even Start and Families that Work projects
- 5 • Become knowledgeable with State, Federal and local program guidelines;
- 6 • Serve as a communication link for program participants and partnering agencies;
- 7 • Assist with recruitment, family service planning and retention of family literacy program participants;
- 8 • Assist with the coordination of enrollment, orientation and placement of adults in Family Literacy classes;
- 9 • Assist with the collection and maintenance of data and record in order to comply with program requirements;
- 10 • Assist with the on-site coordination between teachers/parents/childcare providers and support agencies;
- 11 • Support an anti-bias program, respecting participants' diversity, ethnicity and confidentiality;
- 12 • Attend consortium meetings, create and distribute a record of meeting minutes and maintain a roster of community agency consortium representatives;
- 13 • Order, receive and maintain inventory following established procedures.
- 14

15 3.15 Mr. Commeree submitted the Personnel Request form to Ms. Campbell, who signed the
16 request on August 3, 2001. Mr. Lemos signed the form on August 6, 2001.

17

18 3.16 President Thornton signed the form which authorized creation of the exempt Family
19 Literacy Program Specialist position.

20

21 3.17 The College exempted the Family Literacy Program Specialist position under the extension
22 and/or continuing education exemption. WAC 251-01-170 defines the extension and/or continuing
23 education exemption as:

24
25 Individuals considered exempt in this category are responsible for originating and
26 developing formal education programs for the general public, usually involving close
contact with faculty and staff or training or consulting with specific groups in the

community to enable them to provide specialized training and/or services to the community.

3.18 On October 11, 2001, an individual was appointed to the Family Literacy Program Specialist position. Mr. Commeree described the incumbent's duties, which included coordinating the testing of students referred to the program by DSHS; communicating with DSHS case managers regarding student progress, performance and class attendance; conferring and collaborating with program instructors and employees/students of Kennewick school district. The incumbent also recorded and reported on program compliance data. The position is currently vacant.

Delegation of Authority to Exempt Positions

3.19 RCW 28B.10.528 provides that:

The governing boards of institutions of higher education shall have power, when exercised by resolution, to delegate to the president or his designee, of their respective university or college, any of the powers and duties vested in or imposed upon such a governing board by law. Delegated powers and duties may be exercised in the name of the respective governing board.

3.20 RCW 28B.50.140(14) provides the governing board of an educational institution with the ability to delegate powers to the Chief Executive (the President) of an institution and mandate that the board "perform any other duties and responsibilities imposed upon it by this chapter." RCW 28B.50.140(20) states that the Board of Trustees "shall perform any other duties and responsibilities imposed by law or rule and regulation of the state board."

1 3.21 The Columbia Basin College Board of Trustees adopted policies concerning the authority of
2 the College President. On January 7, 1997, the Board of Trustees adopted by vote policy BSL-2,
3 entitled "Delegation to the Chief Executive," which states:

4 All board authority delegated to the operating organization is delegated through
5 the chief executive, so that all authority and accountability of the operating
6 organization -- as far as the board is concerned -- is considered to be the authority
7 and accountability of the chief executive.

8 3.22 Policy BSL-2, subsection 2, further provides that "the chief executive is authorized to
9 establish all further policies, make all decisions, take all actions, establish all practices and develop
10 all activities." In the case here, the Board of Trustees appropriately delegated authority to the
11 President (Chief Executive).

12
13 3.23 The Board of Trustees also adopted By-Laws. In relevant portion, Section 7 of the these
14 By-Laws indicates as follows:

15 All items that are within the President's prerogative as set forth in Board Policy
16 BSL-2:2, but require Board approval by RCW and/or WAC codes, shall be placed
17 on a Consent Agenda. The Consent Agenda shall be voted upon without
18 discussion. However, any member of the Board may request removal of any item
19 on the Consent Agenda for discussion at the next meeting of the Board.

20 (emphasis added)

21 3.24 The By-Laws adopted by the College clearly establish that any action that requires "Board
22 approval by RCW and/or WAC" be placed on the Consent Agenda. Because RCW 41.06.070(2)(b)
23 grants the governing board of a higher educational institution the power to exempt certain job
24 specifications from coverage of Chapter 41.06, any request to exempt a position from classified
25 service must be placed on the Consent Agenda.
26

1 3.25 The decision to exempt the Family Literacy Program Special and the WABERS Analyst
2 positions were not placed on the Consent Agenda, and therefore, exemption of the positions was not
3 approved by the College Board of Trustees.
4

5 **IV. ARGUMENTS OF THE PARTIES**

6 4.1 Appellant argues that CBC's exercise of delegated exemption authority fails to comply with
7 the express terms of the College Board's delegation. Appellant argues that the policies adopted do
8 not support the position that the President acted consistently with the delegation from the CBC
9 Trustees. Appellant argues that the exemption of positions was not placed upon the "Consent
10 Agenda" even though action on such items was a matter requiring Board approval under RCW
11 41.06.070(2) and former WAC 251-04-040. Appellant contends that CBC's delegation of authority
12 to exempt positions from civil service and collective bargaining under RCW 41.06.070(2)(b) fails to
13 include required minimum procedural safeguards. Appellant argues that the exemption of a
14 position from the provisions of Chapter 41.06 RCW not only has significant consequences to the
15 rights of employees and citizens applying for employment, but also determines whether an
16 employee in that position will be eligible for collective bargaining rights and representation by the
17 union. Appellant asserts that by failing to place the exemption of position on the Consent Agenda,
18 CBC failed to allow public comment or review. Appellant argues that CBC should not be allowed
19 to continue to fill positions in violation of the law.
20

21 4.2 Appellants argues that the duties of the Family Literacy Specialist and the WABERS
22 Analyst positions do not meet the statutory criteria for exemption. Appellant argues that the duties
23 of these positions can be found in class specifications adopted by the Department of Personnel.
24 Appellant argues that the Family Literacy Specialist does not originate formal education programs
25
26

1 and that the position is really intended to help coordinate the program. Appellant argues that while
2 the position was supporting continuing education work, it was not teaching or educating.

3
4 4.3 Appellant argues that the WABERS Analyst position does not perform any research or meet
5 any of the other criteria necessary for exemption under the research exemption. Appellant argues
6 that the position was simply running reports from standardized software and that Mr. Commeree
7 was the individual responsible for identifying what information to gather. Appellant further argues
8 that the exemption definition is clearly directed to the type of academic research that is conducted at
9 major research institutions.

10
11 4.4 Respondent argues that pursuant to RCW 28B.10.528 and RCW 28B.50.140(14) and (20),
12 the CBC Board of Trustees has the authority to delegate the powers and duties imposed on it.
13 Respondent argues that by the adoption of the CBC Board Policies, specifically BSL-2, the Board
14 appropriately delegated that authority to its Chief Executive, the College President. Respondent
15 contends that RCW 41.06.070(2) is a power and duty vested in the board that is delegable to the
16 CBC Chief Executive and that with the adoption of the Board Policies, the CBC Board legally and
17 official delegated to the CBC President the authority to exempt positions from coverage by Chapter
18 41.06 RCW. Respondent argues that the President acted within his authority when he classified the
19 positions as exempt.

20
21 4.5 Respondent argues that the WABERS Analyst position was properly exempted because it fit
22 the exemption definition of research activities. Respondent argues that the position was to be
23 involved in generating reports that would facilitate Mr. Commerre's analyzing of data. Respondent
24 argues that from that analysis, a development of conclusion and hypotheses could be made.

1 4.6 Respondent argues that the Family Literacy Specialist position was properly exempted
2 because it fit the exemption definition of extension or continuing education activities. Respondent
3 contends that the position was responsible for helping to originate and develop the Federal Even
4 Start and Families that Work programs by combining the two programs into one. Respondent argues
5 that the position was also responsible for serving as a communication link with partnering agencies
6 and meets the definition of “consulting with specific groups in the community.” Respondent argues
7 that the position was responsible for coordinating enrollment, orientation, placement, and retention,
8 recruitment, task which meet the activities in the definition.

9
10 4.7 Respondent argues that the exemptions are very broad in definition as set forth in the WACs
11 and the Board should conclude that the Family Literacy Program Specialist and the WABERS
12 Analyst were properly exempted from coverage by Chapter 41.06 RCW

13 14 **V. CONCLUSIONS OF LAW**

15 5.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

16
17 5.2 In an appeal of an alleged rule violation, Appellant has the burden of proof. (WAC 358-30-
18 170).

19
20 5.3 The issue before the Board is whether the WABERS Analyst position and Family Literacy
21 Specialist position meet the criteria for classifications exempted under RCW 41.06.070(2)(b).

22 23 **WABERS Analyst position**

24 5.4 We have reviewed the job description for the WABERS Analyst position as well as Mr.
25 Commeree’s testimony regarding the type of work performed by the incumbent while the position
26 was filled. The tasks assigned to the WABERS Analyst position do not meet activities necessary

1 for exemption under the research exemption as defined in WAC 251-01-370, The position is not
2 responsible for identifying and defining research problems, designing approaches or hypotheses and
3 methodology to be used, designing specific phases of research projects, developing conclusions and
4 hypothesis, and presenting research results in publishable form. Instead, the focus of the WABERS
5 position is to run reports using the WABERS software, a software program provided to the College
6 to facilitate federal data collection in order to meet data reporting requirements.

7 8 **Family Literacy Program Specialist Position**

9 5.6 We have also reviewed the job description for the Family Literacy Program Specialist as
10 well as Mr. Commeree's testimony regarding the type of work performed by the incumbent while
11 the position was filled. These assigned tasks do not meet the activities necessary for exemption
12 under the extension and/or continuing education exemption, as defined in WAC 251-01-170. The
13 position does not originate or develop formal education programs for the general public. Instead,
14 the focus of the position is to provide support and assistance to the Family Literacy Program
15 Manager with the Federal Even Start program and the Families that Work project. While the role of
16 the of program specialist is to help coordinate and integrate those two programs, nothing supports
17 that individual had any responsibility for originating or developing the Federal Even Start program
18 or the Families that Work project. Furthermore, the communication with program participants and
19 other individuals is not intended to facilitate the incumbent to provide specialized training and/or
20 services to the community. Rather, the contact is limited to answering questions, providing onsite
21 coordination between providers and clients and administering placements tests.

22
23 5.7 The College has an obligation to include positions within the civil service if they do not
24 meet the statutory terms for exemption. Neither the WABERS Analyst position nor the Family
25 Literacy Specialist position meet the criteria for classifications exempted under RCW

1 41.06.070(2)(b). Appellant has met his burden of proving that Respondent violated RCW
2 41.06.070(2)(b).

3
4 5.8 Finally, even if the positions had been properly exempted from Chapter 41.06 RCW, the
5 process used by the College to approve that exemption was flawed and failed to comply with the
6 College By-Laws, which require that any item needing “Board approval by RCW and/or WAC
7 code” be placed on the Consent Agenda. The College’s failure to do so deprived affected
8 employees and others from receiving notice of the College’s intent to exempt a position. Moreover,
9 these affected individuals were further deprived of the opportunity to respond and comment on a
10 proposal to exempt a position. This public forum provides for procedural safeguards to “ensure that
11 administratively promulgated rules and standards are as subject to public scrutiny and judicial
12 review as are standards established and statutes passed by the legislature.” Barry & Barry v. Dep’t.
13 of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972).

14
15 5.9 WAC 251-06-050(1) outlines the procedures for allocating of a position and reads as
16 follows:

17
18 The personnel officer shall allocate or reallocate each classified position to the
19 appropriate class in the classification plan. In determining the class to which the
20 position should be allocated, specifications describing each class shall be
21 considered as a whole. Consideration should be given to the general duties,
22 specific tasks, responsibilities, and relationships to other classes as a composite
23 description of the kind of employment that the class is intended to embrace. The
24 personnel officer shall allocate the employee’s position to the class which best
25 describes the overall duties and responsibilities.

26 5.10 The appeal of Paula Ochoa should be granted, and Respondent should be directed to review
the duties of the affected positions and allocate them according to criteria required under WAC 251-
06-050. The College is further directed to comply with the requirements of RCW 41.06.070(2)(b)

1 and to place any future proposals to create exempt positions on the Consent Agenda for approval by
2 the Board of Trustees.

3
4 **VI. ORDER**

5 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Paula Ochoa is granted and
6 Respondent is directed to review the duties of the affected positions and allocate them according to
7 criteria required under WAC 251-06-050

8
9 IT IS FURTHER ORDERED that Respondent is directed to comply with the requirements of RCW
10 41.06.070(2)(b) and ensure that the Board of Trustees approves creation of exempt positions.

11
12 DATED this _____ day of _____, 2003.

13
14 WASHINGTON STATE PERSONNEL APPEALS BOARD

15
16 _____
17 Gerald L. Morgen, Vice Chair

18
19 _____
20 René Ewing, Member

21
22
23
24
25
26
Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504